

Notre Dame Law Review

Volume 28 | Issue 4 Article 5

8-1-1953

Recent Decisions

Harry D. Snyder

John A. Vuono

Leonard J. Kamer

John A. Young

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

 Part of the Law Commons

Recommended Citation

Harry D. Snyder, John A. Vuono, Leonard J. Kamer & John A. Young, *Recent Decisions*, 28 Notre Dame L. Rev. 548 (1953).
Available at: http://scholarship.law.nd.edu/ndlr/vol28/iss4/5

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

RECENT DECISIONS

ADMINISTRATIVE LAW — JUDICIAL REVIEW — DEPORTATION ORDERS NOT REVIEWABLE UNDER ADMINISTRATIVE PROCEDURE ACT. — *Heikkila v. Barber,* ....U.S....., 73 S.Ct. 603 (1953). The petitioner is an alien whose deportation was ordered by the Attorney General of the United States. He brought an action against the District Director of Immigration and Naturalization seeking a "review of agency action" as well as injunctive and declaratory relief. The United States District Court for the Northern District of California dismissed the complaint without opinion, and Heikkila appealed, contending that he was entitled to such review under Administrative Procedure Act § 10, 60 STAT. 243, 5 U.S.C. § 1009 (1946).

The Supreme Court, two Justices dissenting, held that Administrative Procedure Act § 10 did not apply in deportation proceedings because Immigration Act § 19, 39 STAT. 889 (1917), as amended, 54 STAT. 1238 (1940), 8 U.S.C. § 155(a) (1946), 62 STAT. 1206 (1948), 8 U.S.C. § 155(c) (Supp. 1952), making the decision of the Attorney General "final" in deportation cases, is a statute precluding judicial review, and as such falls under the first exception to § 10 which provides for judicial review of administrative determinations, "Except so far as (1) statutes preclude judicial review." The Court stated further that since deportation orders had not been made judicially reviewable by the Administrative Procedure Act, they can be challenged only by habeas corpus, the sole method available prior to the adoption of that Act.

This case settles a question that has been highly debated in the lower courts since the adoption of the Administrative Procedure Act in 1946. The Department of Justice first contended that the Act generally, 60 STAT. 237, 5 U.S.C. § 1001 *et seq.* (1946), did not apply to deportation proceedings. The Supreme Court, however, dispelled this contention by its holding in *Wong Yang Sung v. McGrath,* 339 U.S. 33, 53 (1950), "that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity."

It remained the contention of the Justice Department, however, that although the Act did apply generally to deportation proceedings, § 10 dealing with judicial review either did not apply at all, or if it did apply, did not change existing procedure. In this respect the department was relying on the interpretation of § 10 advocated by Attorney General Clark while the bill was pending in the Senate. See SEN. DOC. No. 248, 79th Cong., 2d Sess. 415 (1946). Prior to the adoption of the Act, the decision of the Attorney General in a deportation order was regarded as "final," and could be attacked only by invoking the constitutional privilege of habeas corpus. *Assollini v. Watkins,* 172 F.(2d) 897 (2d Cir. 1949). Following the above reasoning, immigration officials con-

tinued to maintain that habeas corpus remained the only remedy available to an alien whose deportation had been ordered.

In the first district court case in which an alien claimed the right of review under § 10 of the Act, the Attorney General's view was controlling. *United States* ex rel. *Trinler v. Carusi,* 72 F.Supp. 193 (E.D. Pa. 1947). Trinler, an alien whose deportation had been ordered but who had not as yet been taken into custody, filed a "Petition of Review" which the court dismissed, maintaining that the Administrative Procedure Act did not establish any new methods of review. Trinler was told, in effect, that he must wait until he was taken into custody, and then to seek review by habeas corpus.

The above decision met with adverse criticism in 96 U. OF PA. L. REV. 268, 270 (1947), wherein it was stated:

> It would be more consonant with our philosophy of personal liberty as a natural right to make the remedy available to the injured party without first depriving him of his liberty.

Following the same line of reasoning, the United States Court of Appeals for the Third Circuit reversed the district court decision: *United States* ex rel *Trinler v. Carusi,* 166 F.(2d) 457, *vacated on other grounds,* 168 F.(2d) 1014 (3d Cir. 1948). The court pointed out that although the Immigration Act terms decisions of the Attorney General as "final," they are not in reality "final" because of the fact that they can be attacked by habeas corpus. Labelling habeas corpus as "review," the court concluded that the Immigration Act § 19, under which deportation orders are rendered, could not be considered a statute excluding judicial review. Since Administrative Procedure Act § 10 allows review "Except so far as (1) statutes preclude judicial review," the alien was deemed entitled to a declaratory judgment.

This ruling of the court of appeals became controlling in later court of appeals cases: *Paolo v. Garfinkel,* 200 F.(2d) 280 (3d Cir. 1952); *Prince v. Commissioner,* 185 F.(2d) 578 (6th Cir. 1950); *Podovinnikoff v. Miller,* 179 F.(2d) 937 (3d Cir. 1950); *Kristensen v. McGrath,* 179 F.(2d) 796 (D.C. Cir. 1949) *aff'd,* 340 U.S. 162 (1950); (it is to be noted, however, that the Court declared, 340 U.S. at 169, that it was unnecessary to "consider the applicability of § 10" for purposes of the decision). Support was almost unanimous in the district courts also; *Birns v. Commissioner,* 103 F.Supp. 180 (N.D. Ohio 1952); *Vergas v. Shaughnessy,* 97 F.Supp. 335 (S.D.N.Y. 1951); *Slavik v. Miller,* 89 F.Supp. 575 (W.D. Pa. 1950); *de Koning v. Zimmerman,* 89 F.Supp. 891 (E.D. Pa. 1950). It is significant to note in *Vergas v. Shaughnessy, supra,* the court went so far as to say, 97 F.Supp. at 338:

> That one resisting an order of deportation is no longer confined to habeas corpus but may maintain a declaratory judgment suit after having exhausted administrative remedies is no longer open to question.

The present case, then, is set against a background of contrary decisions in the lower courts. The opinion of Justice Clark who spoke for the majority of the Court, is strongly reminiscent of the views which he expressed on the question of judicial review while he was serving as Attorney General. See SEN. DOC. No. 248, *supra*. He concludes, 73 S.Ct. at 605, that "the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution."

The majority opinion next considers three court of appeals decisions that have held that habeas corpus itself constituted judicial review, *United States* ex rel. *Trinler v. Carusi, supra*; *Kristensen v. McGrath, supra*; and *Prince v. Commissioner, supra*. The Court points out that under habeas corpus proceedings judicial review is confined to the enforcement of constitutional due process requirements, a highly limited type of inquiry compared to the statutory review made possible under Administrative Procedure Act § 10. It is this difference in the scope of inquiry that sets habeas corpus apart from other forms.

The dissenting opinion emphasizes the apparent injustice of requiring a man to be taken into custody before being given recourse to the courts, and advocates a system under which the alien would be entitled to a declaratory judgment, limited, however, to the scope of review appropriate in habeas corpus proceedings. By changing the form of review, but retaining the limited scope, the courts would enable an alien to challenge a deportation order at an early date and secure substantially the same ruling he would receive were he to wait until being deprived of his liberty.

The majority grants that such review as advocated in the dissent would reduce the hardships imposed upon the alien by the habeas corpus procedure, but holds that, as the law exists today, the Court has no choice but to deny judicial review. Thus the question is finally answered. The lower courts must now deny the type of review allowed by the court of appeals in the *Trinler* case, and must limit inquiry to the form which was available before the adoption of the Administrative Procedure Act nearly seven years ago.

Harry D. Snyder.

CONSTITUTIONAL LAW — GAMBLERS' OCCUPATIONAL TAX ACT — VALID EXERCISE OF CONGRESSIONAL POWER TO TAX. — *United States v. Kahriger*, ...U.S....., 73 S.Ct. 510 (1953). The defendant was indicted for failure to comply with the provisions of the Revenue Act of 1951, 65 STAT. 530 (1951), 26 U.S.C. §§ 3290, 3291, 3294 (Supp. 1952) (Gamblers' Occupational Tax Act), which levies a special tax of fifty dollars on persons engaged in the business of accepting wagers. The statute also requires those subject to the tax to register with the Collector

of Internal Revenue, disclosing their names, residence, place of business and the names of all other persons who are engaged in the same activity on their behalf. Failure to comply is punishable by imprisonment up to five years or by a fine of $10,000, or both. 53 STAT. 290, 26 U.S.C. § 2707 (1946).

The district court granted the defendant's motion to dismiss the information on the ground that the Act was unconstitutional. *United States v. Kahriger,* 105 F.Supp. 322 (E.D. Pa. 1952). It was the opinion of the lower court that Congress, under the pretense of exercising its power to tax, was attempting to penalize illegal intrastate gambling through the regulatory features of the Act. On appeal, the Supreme Court upheld the power of Congress to levy a tax even though it bears more heavily upon certain activities than upon others, and, in effect, tends to regulate the activity.

Notwithstanding this recent decision, much controversy has arisen where the federal government has attempted, through the guise of taxation, to regulate matters ordinarily considered of exclusive state concern. Where such legislation has rested upon other congressional powers, the courts have generally sustained the statutes. This has frequently been tested in regard to the Commerce Clause of the Constitution. The Commerce Clause has been invoked to bar the transportation of women for immoral purposes, *Caminetti v. United States,* 242 U.S. 470 (1917); to bar the importation of pictures of prize fights, *Weber v. Freed,* 239 U.S. 325 (1915); to prohibit the transportation of lottery tickets between states, *Lottery Case,* 188 U.S. 321 (1903). In *United States v. Darby,* 312 U.S. 100 (1941), which reversed *Hammer v. Dagenhart,* 247 U.S. 251 (1918), the Supreme Court, in discussing the power of the federal government to regulate interstate commerce, observed, 312 U.S. at 114, that, "It is no objection . . . that its exercise is attended by the same incidents which attend the exercise of the police power of the states." These decisions are practically unanimous in reciting that the motive and purpose of a regulation of interstate commerce are matters of legislative concern over which the judiciary has no control.

There is little reason why the courts should experience any more difficulty when some legislative power other than the regulation of interstate commerce is involved. The federal taxing power should not be considered judicially weaker in this respect than the power to regulate interstate commerce. The power of Congress to tax is an extensive one, the constitutional restraints consisting of only one exception and two qualifications. "Congress cannot tax exports and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." *License Tax Cases,* 5 Wall. 462, 471 (U.S. 1867). There is no limitation on the right of Congress to select subjects on which to impose an indirect tax. Even though Congress may not legislate on a particular subject wholly within state control, its power to tax that subject matter is not

barred. *United States v. Robinson,* 107 F.Supp. 38 (E.D. Mich. 1952). It follows logically that Congress has the constitutional power to levy taxes upon businesses and occupations. There is little doubt that wagering may be classified as a business or occupation, "even though it is thereby accorded undeserved dignity." *United States v. Nadler,* 105 F.Supp. 918, 919 (N.D. Cal. 1952).

Consequently, in the strong majority of cases, the courts have sanctioned obvious regulatory measures, on the apparent grounds of the legislative taxing power. A tax on marihuana, *United States v. Sanchez,* 340 U.S. 42 (1950); a tax on firearms, *Sonzinsky v. United States,* 300 U.S. 506 (1937); a tax on the sale of oleomargarine, *A Magnano Co. v. Hamilton,* 292 U.S. 40 (1934); a tax on narcotics, *Nigro v. United States,* 276 U.S. 332 (1928), *United States v. Doremus,* 249 U.S. 86 (1919); and a tax on state bank notes, *Veazie Bank v. Fenno,* 8 Wall. 533 (U.S. 1869), have been affirmed by the Supreme Court as valid exercises of the broad powers of Congress to levy taxes.

These cases are unanimous in reciting that inquiry into the hidden motives which move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts. *Sonzinsky v. United States, supra,* 300 U.S. at 513-14; *United States v. Doremus, supra,* 249 U.S. at 93. In *McCray v. United States,* 195 U.S. 27 (1904), a case involving a tax on colored oleomargarine, the Court, conceding that the function of the judicial department of our government is to enforce the Constitution, and thus to determine whether a given manifestation of authority has exceeded the power conferred by that instrument, added, 195 U.S. at 54:

> . . . no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.

The Court further stated that to announce such a principle would be tantamount to charging the judiciary with the responsibility of correcting every possible abuse arising from the exercise by other governmental departments of their conceded authority.

It has long been established that an act of Congress, which on its face purports to be an exercise of the taxing power, is not any less so because the tax is burdensome, In re *Kollock,* 165 U.S. 526 (1897); or because its enforcement tends to restrict or even destroy a particular occupation or business, *A Magnano Co. v. Hamilton, supra,* 292 U.S. at 44. *Sonzinsky v. United States, supra,* involved a dealers' tax on a "limited class" of objectionable firearms. The obvious purpose of the measure, in effect prohibitory, was to regulate rather than to tax. In sustaining the Act, the Court declared, 300 U.S. at 513:

> Every tax is in some measure regulatory. To some extent it interposes an economic inpediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect.

Sonzinsky clearly established the general rule that a legislative measure purporting on its face to impose a valid indirect tax may not be held repugnant to the Constitution merely because it has the effect of regulating or suppressing a subject matter that is within the control of the states, or because it seeks to achieve some purpose other than that of merely raising revenue.

In spite of the acceptance of this principle, there have been a few decisions to the contrary. The instant case was decided in the lower court on the basis of the Supreme Court's holding in *United States v. Constantine,* 296 U.S. 287 (1935), which involved a special excise tax of $1,000, imposed only on those who violated a state liquor law. The Court held that this constituted a penalty for the violation of a state law, and as such, was beyond the limits of federal power. After declaring certain conduct to be illegal, performance of the illegal conduct was "taxed." This factor, along with the wide discrepancy between taxes on legal and those on illegal liquor dealing, branded the exaction as a penalty rather than a legal tax.

However, this case may be distinguished from the instant one on the basis of the decision in *Sonzinsky v. United States, supra,* where the Court pointed out, 300 U.S. at 516, that the tax in the *Constantine* case was a special tax placed only on those who carried on a business in violation of a state law. The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers, regardless of whether or not such activity violates state laws.

Another "taxing" statute received the *Constantine* treatment in *Child Labor Tax Case,* 259 U.S. 20 (1922), where Congress, attempting to rectify sub-standard labor conditions, imposed a tax upon products manufactured under such conditions. In declaring the "tax" unconstitutional, the Supreme Court distinguished the decisions which had upheld previous taxes by declaring that the ten per cent exaction was not in fact a tax at all, but rather a penalty upon those who transgressed the regulation. *Accord, Carter v. Carter Coal Co.,* 298 U.S. 238, 288-89 (1936); *Hill v. Wallace,* 259 U.S. 44, 66-68 (1922).

This hesitation on the part of the judiciary to affirm all such measures as constitutional seems partly due to the oft-quoted declaration by Chief Justice John Marshall in *M'Cullough v. Maryland,* 4 Wheat. 316, 431 (1819): "That the power to tax involves the power to destroy. . . ." It must be realized, however, that this principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. If this aphorism could be applied to a lawful tax, there would be an end to all taxation.

Conceding that Congress is within its constitutional limits in passing such a dual-purpose revenue act, does it also have the power, as in the principal case, to require disclosure of information which will enable

proper state authorities to achieve the ulterior purpose of the act? Such ancillary provisions have been universally upheld where "the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution." *United States v. Doremus, supra,* 249 U.S. at 93. *Accord, License Tax Case, supra.* On the basis of this authority, the provisions of the Gamblers' Occupational Tax Act requiring the taxpayer to divulge his places of business and his business associates must be sustained as having a reasonable relation to the process of levying and collecting the tax, even though such disclosures are peculiarly adapted to assist state authorities in their work of law enforcement and vice control.

There is little doubt as to the motive for the enactment of the statute in question. Its passage was prompted by the hearings of the Kefauver Committee which showed the nefarious activities of persons engaged in wagering. As has been shown, Congress may use its power to tax in order to bear more heavily on certain activities than on others, and a tax which indirectly tends to regulate or curb some vice has been considered constitutional.

John A. Vuono.

LIBEL — NEWSPAPERS — STATUTORY DUTY TO PUBLISH REPLY OR RETRACTION. — *Manasco v. Walley,* ....Miss....., 63 So.(2d) 91 (1953). The defendant-appellant, in his newspaper, printed an editorial questioning the role of the plaintiff-respondent, then the State Representative of the local area, in the removal of certain local highways from a "priority list" for construction and repair. The editorial pointedly asked whether this was the proper manner in which to represent the citizens who had elected him. At the time the plaintiff was a candidate for reelection. When the defendant refused to publish his reply to the editorial, the plaintiff brought suit for damages under MISS. CODE ANN. § 3175 (1942), which imposes a duty upon newspapers of the state to publish the reply of a candidate to any article or editorial which reflects upon his honesty, integrity, or moral character. Further provision is made for damages in the amount of $500.00 or the actual injury suffered, whichever is greater, in the event of the newspaper's refusal to publish such a reply. The court ruled that the editorial was not defamatory as a reflection upon the honesty, integrity, or moral character of the plaintiff, and therefore did not come within the purview of the statute.

The imposition by statute of a duty to publish affected parties' replies to libelous newspaper articles represents a relatively new approach to the problem of defamation in newspaper editorials. Few states have enacted such statutes. Their effect generally is to create a cause of action which

was unknown to the common law. The following statutes, while not identical to the one in the instant case, bear a striking similarity.

CAL. CIV. CODE § 48a (1949) limits the offended party's recovery to special damages in cases where a retraction or correction is published within three weeks after a request to that effect is received by the newspaper from the libelled party, and provided that the retraction is placed in as conspicuous a place as the libelous matter.

IND. ANN. STAT. § 2-1043 (Burns 1933) limits recovery to actual damages in cases where (1) the article was published in good faith, (2) the libel was due to a mistake or misapprehension of the facts, and (3) a retraction has been published within three publishing days of receipt of notice, provided that the retraction is of the same size, type and in the same position in the paper as the alleged libelous article. This statute was interpreted as having no application to publications other than newspapers in *Christopher v. American News Co.*, 171 F.(2d) 275, 281 (7th Cir. 1948), where the libelous article appeared in a magazine.

IOWA CODE ANN. c. 659, §§ 659.2—659.4 (1950), provides that the payment of no more than actual damages shall be ordered if the original article was published through misinformation or mistake of fact, if a retraction is published in as conspicuous a place and type within two weeks after notice. If the libelee is a candidate for public office, the retraction must be published in a conspicuous place on the editorial page two weeks before the election.

NEV. COMP. LAWS § 10506 (1929) appears to be the closest to the statute in the instant case. It provides for a minimum fine of $100.00 and a maximum fine of $1,000.00 or six months imprisonment for refusal to publish a denial of any libelous charge appearing in newspapers or other periodicals. In order to avoid the operation of the statute, the publication of the reply denial must be gratuitous and appear in the next issue following receipt of such denial.

UTAH CODE ANN. § 45-2-1 (1943), like some of the other statutes cited above, limits the recovery of damages where the libel was published in good faith, and a requested retraction has been made. The retraction must be published editorially in a conspicuous place, and in the case of a candidate for office, at least five days before any election or political convention.

The remainder of the states apparently have no provisions requiring the publication of retractions or replies. In these states newspapers are subject to the general rules of libel which state that any false, unprivileged publication by writing, printing, picture, or effigy which would expose any person to hatred, contempt, or ridicule is defamatory.

An exception to this rule, called the doctrine of fair comment, is the privilege given newspapers to comment upon the actions of public men

as long as the statements are true and published without malice. A concise statement of the doctrine of fair comment is found in *Otero v. Ewing,* 162 La. 453, 110 So. 648, 651-2 (1926), where the court said:

> We subscribe to the doctrine that, where a person becomes a candidate for public office, he thereby submits to the electorate his qualifications and fitness for the office to which he aspires, and that his private and public life may be freely and fairly inquired into, discussed, and criticized, with the qualification, however, that the inquiry must be in good faith and the discussion and criticism must be fair, just, and truthful.

Griffin v. Westchester County Publishers Inc., 50 N.Y.S.(2d) 270 (Sup. Ct. 1944), refused to find any overstepping of the bounds of the doctrine of fair comment because the article published caused a candidate for public office embarassment.

There is a conflict of authority in this field regarding misstatements of fact made in good faith. In general, the majority rule is that good faith is no justification for the publication of false statements regarding men in public offices or candidates for such offices. *Arizona Publishing Co. v. Harris,* 20 Ariz. 446, 181 Pac. 373, 376 (1919). The minority view recognizes false and incorrect statements as privileged fair comment so long as such statements are made in good faith. One of the most frequently cited cases supporting this view is *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908) in which a complete statement of the arguments for both the majority and minority rules is set out.

The defense of fair comment and criticism does not apply where the statements are libelous per se. *Hotz v. Alton Telegraph Printing Co.,* 324 Ill. App. 1, 57 N.E.(2d) 137 (1944). The newspaper article in this case had accused members of a canvassing board of dishonesty in the distribution of split votes. However, extremely caustic and severe aspersions which fall short of libel per se have been recognized as privileged when true. *Lukaszewicz v. Dziadulewicz,* 198 Wis. 605, 225 N.W. 172 (1929). The statements which were alleged to be libelous in this case included charges that the plaintiff had remained at home making huge war-time profits while the candidate which the paper supported had been lying wounded in France.

There is no privilege of fair comment where it can be shown that the publication was motivated by malice. *Bausewine v. Norristown Herald,* 351 Pa. 634, 41 A.(2d) 736, 742, *cert. denied,* 326 U.S. 724 (1945). It has even been suggested that where there appears to be no probable cause for the publication, actual malice might be implied. *Jackson v. Pittsburgh Times,* 152 Pa. 405, 25 Atl. 613 (1893).

While statutory enactments imposing a duty on newspaper publishers to print the replies of men in public office whom their articles or editorials have adversely criticized have to some extent extended the liability of newspapers beyond that of the common law, the instant case demonstrates that there has been no attempt to curtail all unfavorable com-

ment. By a strict construction of the words, "honesty or integrity or moral character," the court has left open a wide area for editorial comment and criticism. It is the opinion of this writer that the decision will prove, in the end, to be a wise one.

Leonard J. Kamer.

PATENT LAW — UNSUCCESSFUL INTERFERENCE LITIGANT HAS NO RIGHT TO HAVE PATENTABILITY DECIDED ON APPEAL TO FEDERAL COURTS. — *Sanford v. Kepner,* ....U.S....., 73 S.Ct. 75 (1952). This litigation originated in the Patent Office as an interference proceeding to determine the priority of invention. Both parties claimed common patentable subject matter relating to a control mechanism for use on mine cars. Kepner, the appellee, had filed his application for patent approximately seventeen months prior to the petitioner, Sanford. The latter was not able to sustain the burden of proof of prior invention, and the Board of Interference Examiners rendered its decision on the question of priority in favor of Kepner. Sanford thereupon proceeded in an equity action pursuant to REV. STAT. § 4915 (1875), 35 U.S.C. § 63 (1946), to remove the case to a federal district court where the suit was dismissed for failure to establish "by testimony which in character and amount carries thorough conviction" that the decision of the Board was wrong. *Sanford v. Kepner,* 99 F.Supp. 221, 226 (M.D. Pa. 1951).

The petitioner appealed from the decision of the district court, contesting its finding, and also its refusal to pass upon the question of the patentability of the subject matter in issue in the interference proceeding. Having affirmed the district court's findings in regard to the issue of priority, the question which the circuit court of appeals faced was whether it had been incumbent upon the district court to decide the issue of patentability in regard to Kepner's application at the time it affirmed the Board's refusal to issue a patent to Sanford. The circuit court held that no such determination was required, particularly at the instance of the unsuccessful litigant in an interference proceeding. *Sanford v. Kepner,* 195 F.(2d) 387 (3d Cir. 1952). That decision was affirmed on *certiorari.*

The Supreme Court noted in its decision, 73 S.Ct. at 76, that its purpose in granting *certiorari* was to settle the differences of opinion which existed between the circuits on this question of the duty of the courts to adjudicate questions of patentability in interference proceedings. Apparently, at least the numerical majority had adopted the position opposite to that affirmed by the Court in the instant case. In addition to the cases cited in the opinion itself, *Knutson v. Gallsworthy,* 164 F.(2d) 497 (D.C. Cir. 1947), and *Minneapolis-Honeywell Regulator Co. v. Milwaukee Gas Specialty Co.,* 78 F. Supp. 569 (E.D. Wis. 1948),

aff'd 174 F.(2d) 203 (7th Cir. 1949), other cases which had held that patentability must be decided include: *Mishawaka Rubber & Woolen Mfg. Co. v. Paine & Williams Co.,* 139 F.(2d) 603 (6th Cir. 1943); *Sinko Tool & Mfg. Co. v. Automatic Devices Corp.,* 136 F.(2d) 186 (2d Cir. 1943); *Radtke Patents Corp. v. Coe,* 122 F.(2d) 937 (D.C. Cir.), *cert denied,* 314 U.S. 695 (1941); *McNamara v. Powell,* 256 App. Div. 554, 11 N.Y.S.(2d) 491, 494 (4th Dep't 1939).

A reading of these cases reveals that their holdings rested in large part upon the authority of *Hill v. Wooster,* 132 U.S. 693 (1890). The much-quoted passage in that case in which the requirement for passing on patentability was found, 132 U.S. at 698, reads:

> The provision of section 4915 is that the Circuit Court may adjudge that the applicant "is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear:" and that, if the adjudication is in favor of the right of the applicant, it shall authorize the Commissioner to issue the patent. It necessarily follows that no adjudication can be made in favor of the applicant, unless the alleged invention for which a patent is sought is a patentable invention. The litigation between the parties on this bill cannot be concluded by solely determining an issue as to which of them in fact first made a cabinet creamery. A determination of that issue alone, in favor of the applicant, carrying with it, as it does, authority to the Commissioner to issue a patent to him for the claim in interference, would necessarily give the sanction of the court to the patentability of the invention involved.

Other reasons for requiring that the issue of patentability be decided are to be found in some of the cases: ". . . the interference is only a step in the application, and the application itself is a proceeding to secure a monopoly, not [only] against other parties to the interference, but against the public at large." *Sinko Tool & Mfg. Co. v. Automatic Devices Corp., supra,* 136 F.(2d) at 189; ". . . in determining priority of invention it is necessary for the court to determine the scope of the claims in issue. . . ." *Minneapolis-Honeywell Regulator Co. v. Milwaukee Gas Specialty Co., supra,* 78 F. Supp. at 572.

The opposite view, and the one apparently approved by the Supreme Court in the instant case, interprets REV. STAT. § 4915, 35 U.S.C. § 63 (1946), as merely permissive or enabling in operation with respect to the issuance of a patent following a court adjudication of priority. The decision of a court on the question of priority in an interference suit *authorizes,* but does not *compel,* the Commissioner of Patents to issue the patent. The question of patentability is apparently relegated to further proceedings in the Patent Office. Cases adopting this view include: *Heston v. Kuhkle,* 179 F.(2d) 222 (6th Cir. 1950); *Smith v. Carter Carburetor Corp.,* 130 F.(2d) 555 (3d Cir. 1942); *Cleveland Trust Co. v. Berry,* 99 F.(2d) 517 (6th Cir. 1938); *Christie v. Seybold,* 55 Fed. 69 (6th Cir. 1893); *Sarnes v. Morley,* 56 F. Supp. 735, (E.D. Mich. 1944).

It is this latter view which seems to coincide more closely with the language of the statute, which reads, in part:

> . . . such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication *and otherwise complying with the requirements of law.* [Italics supplied]

One of the requirements of law in regard to patents is that the subject matter of the application be patentable. Neither the language of the statute nor the context in which it is found suggests any intention on the part of Congress to shift the determination of issues of patentability from the Patent Office to the courts. Further indication that the position adopted by the numerical minority on this question is the correct one is to be found in the Rules of Practice in The United States Patent Office which provide: "After judgment of priority, the application of any party may be held subject to further examination. . . ." Patent Office, Rule 266 (Patents 1953), 37 CODE FED. REGS. § 1.266 (1949).

In adopting the view taken by the minority, the Supreme Court in the instant case added little in the way of material grounds for its holding except to point out the inconsistency of the position taken by the appellant when he asked to prove that the invention which he himself had sought to patent was unpatentable.

While the instant case undoubtedly stands for the proposition that an unsuccessful litigant in an interference suit cannot demand that a district court adjudicate the patentability of his opponent's invention, its effect upon *Hill v. Wooster, supra,* seems somewhat unclear. Both the Supreme Court and the circuit court of appeals indicate a distinction between the instant case and *Hill v. Wooster* on the fact that here "the applicant" had been unsuccessful in the interference action. This distinction might be regarded as one without a difference when it is remembered that in both cases, both parties were "applicants," neither having as yet received a patent, and therefore the decision of the court was bound to produce both a successful and unsuccessful applicant. There is a procedural distinction in the cases, since in *Hill v. Wooster,* the successful party had been the petitioner, while in the instant case the respondent emerged victorious. In light of the language used in *Hill v. Wooster, supra,* (quoted above) this would not appear to be a valid difference. The apparent reason for the Court's requirement of an adjudication first of all on patentability, in that case, was that the district court's judgment in regard to priority would serve as an authorization to the Patent Office to issue a patent to the successful party, and "no adjudication can be made in favor of the applicant, unless the alleged invention for which a patent is sought is a patentable invention." It is difficult to see why this reasoning would apply any less in the case where the successful applicant had been the respondent in the court action than where the petitioner was the applicant to whom the court's judgment authorized the issuance of a patent.

A more real distinction seems to lie in the interpretation of the effect of REV. STAT. § 4915, *supra.* Notice in the concluding sentence of the paragraph from *Hill v. Wooster,* quoted above, the statement: "A determination of that issue *alone* . . . would necessarily give the sanction of the court to the patentability of the invention involved." [Italics supplied] Compare this with the position taken by the minority of the courts, which seems to more closely reflect the statutory intent, that the district court adjudication authorizes the issue of the patent upon compliance with the other requirements of law, which would include patentability. This is not the distinction adopted by the Court, however, and, at least on its face, the decision in the instant case would not appear to foreclose the patentability issue in a case where the petitioner was the successful applicant.

If the decision of the Court in this case was ultimately directed at retaining the determination of patentability within the Patent Office instead of relegating that burden to the federal courts, it would seem that better results could have been obtained through an overruling of *Hill v. Wooster* rather than attempting to distinguish it on technical procedural grounds.

John A. Young.

TORTS — DOCTRINE OF DISCOVERED PERIL — ACTUAL KNOWLEDGE REQUIRED. — *Ragsdale v. Lindsey,* ....Tex. Civ. App....., 254 S.W.(2d) 843 (1952). Plaintiff-respondent brought this action against an independent contractor, employed to install lighting fixtures in a drug store, for the personal injuries sustained by his wife. The wife was seated at the soda fountain under a scaffold which the contractor had erected to assist him in his work. In order to reach the seat she took, it was necessary for her to cross over an electric cord which had been placed as a barrier to keep people out of that section of the store where the contractor was working. One of the defendant's agents requested the wife to move to another stool, of which there were several, but she refused. When the scaffold fell a few minutes later she was injured. On the several counts of contributory negligence a verdict was returned against the wife and in favor of the drug store owner. The trial court, however, at the close of all testimony had permitted the plaintiff to file an amendment setting up discovered peril as a basis for recovery against the contractor. The jury returned a verdict in favor of the wife on the discovered peril theory.

On appeal by the contractor, the appellate court reversed the lower court and stated that the doctrine of discovered peril was inapplicable. An essential element of discovered peril in Texas is that the defendant have actual knowledge of the plaintiff's danger, and since the plaintiff's wife in the instant case was not in a position of peril until the scaffold

began to fall, the appellate court held that the evidence was insufficient to show actual knowledge on behalf of the contractor.

The doctrine of discovered peril is a limited application of the last clear chance doctrine that found its origin with the decision in *Davies v. Mann,* 10 M. & W. 546, 152 Eng. Rep. 588 (Exch. 1842), and is the most commonly accepted modification of the strict rule of contributory negligence. Prosser, *Torts* § 54 (1941). A recent case, *Lewis v. Mackley,* 122 Ind. App. 253, 99 N.E.(2d) 442, 445 (1951), gave a general statement of the rule derived from *Davies v. Mann, supra*:

> . . . the negligence of the plaintiff does not prevent a recovery for the negligence of the defendant where it appears the defendant by exercising reasonable care might have avoided injuring plaintiff, notwithstanding the plaintiff's negligence.

The Texas courts have consistently held that there are three elements which must be proven to apply the doctrine of discovered peril: (1) The exposed position in which the plaintiff has placed himself through his own negligence; (2) The actual discovery by defendant of the perilous position of the plaintiff in time to have avoided the injury, by the use of all means at his disposal commensurate with his own safety; (3) The failure of the defendant to use such means. *Turner v. Texas Co.,* 138 Tex. 380, 159 S.W.(2d) 112 (1942); *Baker v. Schafter,* 231 S.W. 349 (Tex. Com. App. 1921).

In *Sisti v. Thompson,* 149 Tex. 189, 229 S.W.(2d) 610 (1950), the court brought out a fourth element of discovered peril by holding that the jury should be allowed to decide whether the plaintiff could possibly have extricated himself from the dangerous position. There was a dissenting opinion, however, which said that this extra element is covered by requiring a showing that the defendant was conscious of the plaintiff's perilous position. Since it must be shown that defendant had actual knowledge of the plaintiff's danger, this necessarily includes the fact that plaintiff could not extricate himself *since it would not be perilous if plaintiff could extricate himself.*

That there must be *actual* knowledge of the perilous position was clearly brought out in *East Texas Theatres Inc. v. Swink,* 142 Tex. 268, 177 S.W.(2d) 195 (1944). The plaintiff was being led through a dark theatre by the defendant. The latter jumped from the floor to the stage, and plaintiff, without warning of the dangerous situation, attempted to follow. Instead, he fell into a pit which ran along the front of the stage and injured himself. The court held that if the defendant did not have actual knowledge of the dangerous position of the plaintiff in time to have avoided the injury the most important element of discovered peril was not shown. Plaintiff was not in a perilous position until he started to jump upon the stage. The evidence showed that jumping upon the stage and falling into the pit was one continuous act, and consequently the defendant had no time in which to actually discover the plaintiff's peril.

Actual knowledge of the perilous position of the plaintiff in time to avoid the injury is required by jurisdictions other than Texas, though all courts do not call it the doctrine of discovered peril when they apply it to a case. Cases in other jurisdictions which have required actual knowledge by the defendant in time to avoid the injury as a prerequisite to liability include: *Boone v. Massey,* 212 Ark. 280, 205 S.W.(2d) 454 (1947) (the doctrine of discovered peril or last clear chance is a limitation on the rule of contributory negligence and the defendant to be liable must discover the peril in time to avoid the injury); *Gauthier v. Foote,* 12 So.(2d) 9 (La. App. 1943) (actual knowledge of peril must be shown before doctrine of last clear chance may be applied); *Dulemba v. Tribble,* 325 Mich. 143, 37 N.W.(2d) 894 (1949) (under last clear chance or subsequent negligence doctrine plaintiff must have placed himself in a position of peril and defendant must discover the peril of plaintiff in time to avoid the injury); *Hamlin v. Roundy,* 96 N.H. 123, 71 A.(2d) 419 (1950) (it is not enough that defendant should have discovered the peril of plaintiff but he must in fact discover the peril in time to avoid the injury for recovery under the last clear chance doctrine); *Chadwick v. City of New York,* 301 N.Y. 176, 93 N.E.(2d) 625 (1950) (the proof must support the inference that defendant had actual knowledge of plaintiff's peril); *Coins v. Washington Motor Coach Co.,* 34 Wash.(2d) 39, 208 P.(2d) 143 (1949) (even though the defendant is negligently unaware of plaintiff's peril, if he did not have actual knowledge of the peril the doctrine of last clear chance will not apply).

A more widely accepted view, however, and the one that is the general rule in this country is that defendant need not have actual knowledge of peril if he could have known of the peril through the use of ordinary care in time to have avoided the injury. Some illustrations of cases which have followed this rule are: *Casey v. Marshall,* 64 Ariz. 260, 169 P.(2d) 84 (1946); *Lewis v. Mackley, supra* (doctrine of last clear chance applies if defendant could have been aware of plaintiff's peril by using ordinary care); *Barlow v. Lowery,* 143 Me. 214, 59 A.(2d) 702 (1948) (doctrine of last clear chance or discovered peril applies after defendant has become, or should have become through ordinary care, aware of plaintiff's peril); *Carter v. Zdan,* 151 Neb. 185, 36 N.W.(2d) 781 (1949) (if party against whom the doctrine of last clear chance is asserted knew, or ought to have known, of peril he is liable); *Floeck v. Hoover,* 52 N.M. 193, 195 P.(2d) 86 (1948); *Aydlett v. Keim,* 232 N.C. 367, 61 S.E.(2d) 109 (1950); *Curt v. Ziman,* 140 Pa. Super. 25, 12 A.(2d) 802 (1940); *Harber v. Wallace,* 31 Tenn. App. 1, 211 S.W.(2d) 172 (1946) (even if plaintiff is negligent, if defendant by exercise of ordinary care could have discovered the peril, he is liable); *Graham v. Johnson,* 109 Utah 346, 166 P.(2d) 230 (1946) (if defendant should have known of danger he has last chance to avoid injury); *Anderson v. Payne,* 189 Va. 712, 54 S.E.(2d) 82 (1949).

A notable exception to the theory that defendant must have either actual knowledge of the peril, or in the exercise of reasonable care could have learned of it, is found in Missouri. The Missouri view, known as the humanitarian doctrine, excuses all negligence on the part of the plaintiff and puts a duty on the defendant to avoid the injury if he is operating a dangerous instrumentality such as an automobile or a train, removing any question of whether the defendant was aware or could have been aware of the peril. This theory, strongly emphasizing the importance of human safety, makes it unnecessary for plaintiff to show any care on his part when relying on the doctrine. *Cacioppo v. Kansas City Public Service Co.,* 234 S.W.(2d) 799 (Mo. App. 1950) (operators of dangerous instrumentalities have a duty to avoid careless plaintiffs); *Zickefoose v. Thompson,* 347 Mo. 579, 148 S.W.(2d) 784 (1941).

The Texas application of the last clear chance doctrine, that defendant must know of plaintiff's peril, would seem to be a sensible approach to the situation. When one of two negligent parties is injured, the party with the last opportunity to avoid the injury is liable only if he had *actual* knowledge of the peril in time to avoid the injury. The requirement of actual knowledge by a defendant limits any possibility of making the defendant an insurer of irresponsible and careless plaintiffs.

Allan C. Schmid.

TORTS — THE LIABILITY OF TREE OWNERS FOR FALLING BRANCHES. — *Hay v. Norwalk Lodge,* 92 Ohio App. 14, 109 N.E.(2d) 481 (1952). The plaintiff, as administratrix, brought this action against the Norwalk Lodge and Harry E. Sanders as tenants in common of a tree which grew upon premises abutting a rural highway. A branch from the tree struck a truck travelling upon the highway, crushing the cab and causing the driver to lose control of his vehicle. The driver died as a result of injuries sustained in the accident which followed. The question presented in the case was the extent of the liability of the owner of trees abutting public highways.

It was held that since the Norwalk Lodge was not a legal entity, it was not subject to suit. The plaintiff did, however, receive a judgment against Harry E. Sanders when the court overruled his demurrer. The court stated that while there exists no duty upon a landowner to inspect his trees for the possibility of injury to highway travelers, he is liable if he has actual or constructive knowledge of their dangerous condition.

The decision reached in the instant case, in respect to owners of rural land, is a view which has not been entertained in all jurisdictions. *Chambers v. Whelen,* 44 F.(2d) 340 (4th Cir. 1930), and *Zacharias v. Nesbitt,* 150 Minn. 369, 185 N.W. 295 (1921), represent the two leading

examples of the contrary position. The former case asserted that an owner of rural lands could not be held responsible for injuries to travelers from falling trees and branches, since a contrary holding would place an unreasonable burden upon him to check his property for decaying trees. In the *Chambers* case, the plaintiff's allegation stated that the owner could have learned of the dangerous condition of the tree by reasonable inspection. Again the court, following the Minnesota decision, agreed that the responsibility upon rural land holders would be much too onerous in respect to the duty to inspect should they be held liable upon a constructive notice of dangerous conditions of their trees. The court insinuated, however, that if the same action were instituted against a city property owner it might be decided differently, for the burden of inspection there would be minute as compared with the burden placed on the rural dweller.

The opposite view, and the one in accord with the instant case, found support in another federal case, *Brandywine Hundred Realty Co. v. Cotillo,* 55 F.(2d) 231 (3d Cir. 1931), *cert. denied,* 285 U.S. 555 (1932). The court said that if the owner had actual or constructive knowledge of the condition of his trees, it was his duty to eradicate any possible causes of harm. If the appellant had actual knowledge, or could by proper inspection have learned of the tree's condition, the owner was under a duty to prevent the tree from falling and injuring the traveler.

The liability of a city dweller as regards a decadent tree appears to be relatively well established in the various states. The owner is deemed to be liable for any damage resulting from the tree's condition if he knows or should have known of the condition of the tree. The liability imposed is not a strict liability, but under the circumstances it must appear to the court that there has been negligence on the part of the landowner. In *Smith v. Bonner,* 63 Mont. 571, 208 Pac. 603 (1922), the defendant planted a poplar tree over a cesspool and it was later blown over by an unprecedented storm because of the insecure anchorage of its roots. The tree in falling hit a truck which was parked beneath it and killed the driver. The defendant, among other defenses, maintained that the tree being blown down represented an Act of God. The court held that the defendant's negligence was the proximate cause of the accident, for the tree was planted in a location which would not possibly give the tree's roots a firm anchorage. Although the wind was unprecedented, no other tree of similar size and kind had been blown over. The court in its holding stated the well recognized rule that where there are two causes which contribute to a person's injury or death, the one being the negligence of the defendant and the other the fault of neither party, the defendant is liable if the injury would not have occurred except for his negligence.

In the case of *Weller v. McCormick,* 52 N.J.L. 470, 19 Atl. 1101 (Sup. Ct. 1890), the plaintiff was injured by the fall of a decayed branch from a tree located near the curb. The evidence tended to prove that both the

branch and part of the trunk were rotten. The fact that the branch was dead some time before the accident was sworn to by two witnesses. The court stated that since the defendant had been in possession of his premises through one season of foliage and part of another, the question of his negligence should be submitted to the jury. The court appears to imply from this decision that actual or constructive knowledge of the perilous condition was sufficient to justify imposing liability upon the owner for a resulting injury.

The obvious defects in a tree, which are known or should be known, subject an urban owner to possible liability for damage caused by its fall. The liability of the rural owner for trees abutting upon a highway, as has been mentioned before, is in dispute; but it has been almost universally conceded that the owner of a tree, either in a city or a rural district is absolved from liability for injuries caused by hidden or latent defects. In *Noble v. Harrison,* [1926] 2 K.B. 322, the plaintiff's automobile was struck by a tree branch. It was ascertained, however, that a defect existed in the tree which was not, and could not have been, discovered by a reasonable survey of the tree. The court decided that where a latent defect exists which cannot be observed by a sensible inspection, the owner's liability is extinguished. This view was upheld in *Caminer v. Northern & London Investment Trust, Ltd.,* [1949] 2 K.B. 64. An elm tree was blown over by an ordinary gust of wind because its roots were decayed. It was pointed out that while standing the tree exhibited no exterior manifestations of its condition. It was held that the owner, therefore, was liable neither for negligence nor nuisance, since there was no reasonable way of detecting the tree's potential danger.

The court in the instant case had occasion to reject another defense interposed by the defendant — that a state statute imposing liability upon municipalities for the condition of streets and highways relieved abutting land owners of any duty to the travelling public. 109 N.E.(2d) at 486. Municipal and state codes in many jurisdictions impose liability upon municipalities for injuries caused by trees in public parks or those bordering city boulevards. The court in *Indianapolis v. Slider,* 56 Ind. App. 230, 105 N.E. 56 (1914), stated that when a city has actual notice of a tree's decadent condition and fails to remedy the situation, the city can be held liable for any injury caused by the tree. In *Wright v. City of Chelsea,* 207 Mass. 460, 93 N.E. 840 (1911), it was asserted by the court that, because of a statute, a city assumes liability when its officers fail to take action with regard to a decadent tree when the tree has been in that condition for some time. *Accord, Comm'rs of Washington County v. Gaylor,* 140 Md. 375, 117 Atl. 864 (1922); *Lundy v. City of Sedalia,* 162 Mo. 218, 144 S.W. 889 (1912).

In *City of Montgomery v. Quinn,* 246 Ala. 154, 19 So.(2d) 529 (1944), a child was killed by a limb which fell from a tree growing between a city street and sidewalk. The father brought suit against the

city. The maintenance of street and highways in a condition safe for public travel was held to be not a governmental function such as would provide immunity from liability. The court held the city liable for its failure to keep the tree in a safe condition. This view was upheld later in the same year by another Alabama decision, *Birmingham v. Coe,* 131 Ala. App. 538, 20 So.(2d) 110 (1944). An elm tree had been uprooted and had fallen upon the hood of the plaintiff's car as she was driving down the street. Basing the city's liability on a statute requiring the city to remedy any defect in the streets, alleys or public ways, the court maintained that, upon a showing of actual or constructive notice of the tree's defective condition, the municipality became liable for injury resulting from that condition. The traveler has the right to assume that the city streets and sidewalks are safe for travel.

There are, however, many jurisdictions which are reluctant to expand municipal codes. They assert that the responsibility to maintain public streets and sidewalks does not include the duty of continued surveillance of trees at the peril of liability. In a Massachusetts case, *Andresen v. Lexington,* 240 Mass. 515, 134 N.E. 397 (1922), the decedent was struck by a branch of a tree which had lain upon the telephone wires for some time before it fell. The plaintiff, administrator of the decedent's estate, brought suit against the city claiming that the city was liable for knowingly permitting the continued existence of an apparent danger. Statutes of a municipality which impose an obligation for the correction of defects in the street are not broad enough, claimed the court, to hold the city liable for an individual's death because of the fall of a decadent limb from a tree growing upon private property.

In *Wershba v. City of Lynn,* 324 Mass. 327, 86 N.E.(2d) 511, 514 (1949), a shade tree bordering the street fell on the automobile in which the plaintiff was working and injured him. Subsequent inspection revealed that the tree was completely rotten, and that for at least nine months prior to its fall the city officials knew of its condition. The Massachusetts court found the defendant municipality free of any liability on the basis of a strict interpretation of the word "traveler." The plaintiff's presence in the street in front of his place of business was occasioned by his work upon a customer's car rather than his own use of the street as a place of travel.

The Illinois court in *Lythell v. City of Waverly,* 335 Ill. 397, 82 N.E.(2d) 207 (1948), arrived at the same conclusion regarding municipal liability. In this case, a child was killed by a falling limb while playing marbles in a city park. The court stated that the maintenance of a park is an undertaking of the city in its governmental capacity, and therefore, the city is immune from liability. A California court, on similar facts, *Smith v. San Mateo County,* 62 Cal. App.(2d) 122, 144 P.(2d) 33 (1943), reached the opposite conclusion. A statute, CAL. GEN. LAWS Act 5619, § 2 (1944), apparently lay at the basis of this decision.

The conclusion reached in the instant case, insofar as it holds the rural owner liable for injuries resulting from defective trees on his property when he has actual notice of the defective condition is clearly in accord with the almost universal law on this subject in the United States. For the purpose of ruling upon the demurrer the allegations in plaintiff's complaint that, ". . . the defendants . . . had knowledge that the tree had been damaged and weakened; . . ." 109 N.E.(2d) at 483, had to be accepted as true. The extension of the holding to suggest liability on the basis of "constructive" knowledge in the case of a rural landowner, however, is not so well established. Certainly, in light of the state of the law on this point, the instant case does not seem to preclude the use of the potent defense argument of "an unreasonable burden of inspection" in future cases involving rural landowners.

William B. McFadden.

VENUE — NON-RESIDENT MOTORISTS STATUTES AS CONFERRING JURISDICTION ON FEDERAL COURTS. — *Falter v. Southwest Wheel Co.*, 109 F. Supp. 556 (W.D. Pa. 1953). The plaintiff, a New York resident, brought an action against a Texas corporation for personal injuries sustained in a collision which occurred in Erie County, Pennsylvania, between his own automobile and a tractor-trailer owned and operated by the defendant. The requirements of diversity of citizenship and jurisdictional amount being present, the action was brought in the United States District Court for the Western District of Pennsylvania, in whose territorial jurisdiction the tort occurred. Service on the defendant was secured pursuant to the Non-Resident Motor Vehicle Act of Pennsylvania, PA. STAT. ANN. tit. 75, § 1201 (1953), through the Secretary of Revenue of the Commonwealth. Thereupon the defendant corporation moved to dismiss the complaint for lack of venue on the basis of 28 U.S.C. § 1391(a) (Supp. 1952) which requires that civil actions based on diversity of citizenship be brought in a judicial district where either the plaintiff(s) or the defendant(s) reside(s). The motion was granted. In the present case, the court reconsidered the motion and ruled that use of the state's highways was an implied waiver of the federal statute requirement regarding venue.

The question which the court faced was simply whether or not a state statute could effect a waiver of a federal law.

Soon after the advent of the general use of the automobile the states were compelled to formulate a policy by which they could cope with the problem of protecting their citizens against injury by out-of-state motorists. As early as 1915, the United States Supreme Court in *Hendrick v. Maryland*, 235 U.S. 610 (1915), ruled that a state through its police

power may make laws for the uniform regulation of the operation of cars on highways which may affect non-residents also. In the following year, in *Kane v. New Jersey,* 242 U.S. 160 (1916), a New Jersey law which required non-resident motorists, on entering the state, to designate the Secretary of State as the non-resident motorist's attorney for purposes of service was held not to be in violation of the Fourteenth Amendment.

This doctrine was further extended by the leading case of *Hess v. Pawloski,* 274 U.S. 352 (1927) which held that there was no denial of due process in a Massachusetts statute which regarded acceptance by a non-resident of the rights and privileges of using the state's highways as an implied appointment of a designated state official as his agent upon whom service might be made. [Subsequently, it was held as vital to the constitutionality of such statutes that there be a provision for notice of service to be given to the defendant. *Wachter v. Pizzutti,* 276 U.S. 13 (1928).]

In view of the Supreme Court's approbation of such statutes it is not surprising to find that more and more states enacted non-resident motorists statutes as an effective method to safe-guard their residents from the carelessness of out-of-state drivers. In addition, in almost all instances, the statutes are so drawn as to enable one out-of-state driver to bring suit against another for causes of action which arose within the state from the use of its highways.

In the last few years however, there has been considerable controversy concerning whether these statutes empower a federal court to hear the action in those cases where both parties are non-residents. *Urso v. Scales,* 90 F. Supp. 653 (E.D. Pa. 1950), held that operation of a vehicle within the state under a non-resident motorist statute is a waiver of the privilege of objecting to the venue of the action and constitutes an effective consent to be sued in the state, either in a state court, or, all other requisites being met, in the federal courts. This appears to be the majority rule. Non-resident motorist statutes give jurisdiction to the federal courts as well as to the state courts notwithstanding the venue requirements of 28 U.S.C. § 1391(a) (Supp. 1952). *Kostamo v. Brorby,* 95 F. Supp. 806 (D. Neb. 1951); *Burnett v. Swenson,* 95 F. Supp. 524 (W.D. Okla. 1951); *Morris v. Sun Oil Co.,* 88 F. Supp. 529 (D. Md. 1950).

Underlying these holdings is the premise that an objection to venue is a privilege of the defendant and, as such, may be waived. *Commercial Casualty Ins. Co. v. Consolidated Stone Co.,* 278 U.S. 177 (1929); *Morris v. Sun Oil Co., supra.* Two practical considerations have been advanced in support of the majority view. (1) Much inconvenience and expense can be avoided by permitting the action to be brought in a judicial district where most, if not all, of the witnesses reside and where jurors can be selected who are familiar with the locale of the accident.

Burnett v. Swenson, supra; *Kostamo v. Brorby, supra.* (2) As pointed out in the instant case, 109 F. Supp. at 558, should a non-resident plaintiff begin his suit in a state court, the non-resident defendant could have it removed to the federal courts.

As judicial support for its position, the majority relies heavily upon *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165 (1939). In that case, the out-of-state corporation, pursuant to Section 210 of the General Corporation Law of New York, had designated an agent within the state to receive process, as a prerequisite to doing business there. The Supreme Court held that such a designation of an agent amounted to a consent to be sued in the federal courts of the state as well as the state court.

The minority view on the question, typified by *Martin v. Fischbach Trucking Co.*, 183 F.(2d) 53 (1st Cir. 1950), is quick to point out the distinction between the *Neirbo* case and the non-resident motorist cases. *Neirbo* involved an express and conscious designation of a chosen agent, as contrasted with the involuntary implied appointment involved in the motorist statutes. In the *Martin* case, a resident of Connecticut brought an action against an Ohio corporation in a federal court of Massachusetts for damages to person and property resulting from a collision in Massachusetts. The defendant's motion to dismiss for lack of venue was granted, and the decision affirmed on appeal.

Waters v. Plyborn, 93 F. Supp. 651 (E.D. Tenn. 1950), another case supporting the minority view that non-resident motorist statutes do not confer jurisdiction on the federal courts, also emphasizes the distinguishing feature of the *Neirbo* case. The court rejected the concept of either waiver of privilege or consent to suit as forming the basis of such statutes, regarding them rather as a form of compulsion directly affecting the privileges and immunities of citizens, and as such not entitled to any extension of application beyond their express terms.

The court in the instant case did not fail to take cognizance of the minority view, but clearly indicated its preference for the reasoning of the majority. In addition, the case of *Martin v. Fischbach Trucking Co., supra,* was distinguished. As the court points out, 109 F. Supp. at 557, the Pennsylvania statute, unlike the Massachusetts statute in the *Martin* case, specifically applies to any "suit or proceeding *instituted in the courts of the Commonwealth or in the United States District Courts of Pennsylvania.*" [Italics supplied]. There can be no doubt that the decision was correct.

With all due respect for the reasoning of the courts in the *Martin* and *Waters* cases, the position of the majority on this question appears to more closely approximate the objective intended by the non-resident motorists statutes. More equitable results can be expected from a refusal by the courts to allow the defendant, who has used the state's highways to his advantage, to hide behind the technical protection of a federal

statute regarding venue, than to permit him to compound the plaintiff's difficulties by forcing him to transport his witnesses great distances at considerable expense or to resort to the less effective procedure of depositions. Whether the defendant's use of the state's highways be regarded as a waiver of the privilege to contest venue, or as a consent to suit within the state, it is difficult to see any substantial difference in whether the suit is brought in a federal or a state court.

David N. McBride.

WORKMEN'S COMPENSATION — INJURIES SUSTAINED DURING TRAVEL OR RECREATION AS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT. — *Davis v. Newsweek Magazine,* 305 N.Y. 20, 110 N.E.(2d) 406 (1953). Davis, a science editor for *Newsweek* magazine, had obtained a four week extension of his annual vacation in order that he might have sufficient time to visit several scientific developments to gather material for his writings. He was to receive his regular salary for the period and a $200.00 bonus toward defraying his expenses. After visiting the atomic energy project at Oak Ridge, Tennessee, Davis and his wife, the claimant in this case, started on their way to San Antonio, Texas, to visit the Southern Research Institute. On the way they stopped at a vacation spot in Biloxi, Mississippi. No research was planned at Biloxi, and the resort was not mentioned in the itinerary which Davis had furnished his employer. Being hot and fatigued, Davis went for a swim and was killed when he dived into shallow water.

The Workmen's Compensation Board granted decedent's widow death benefits, and the award was affirmed by the Appellate Division of the Supreme Court, 279 App. Div. 502, 111 N.Y.S.(2d) 228 (3d Dep't 1952). The Court of Appeals of New York, in a four to three decision, reversed the judgment and dismissed the claim.

The only question presented was whether injuries incurred while engaging in recreational activity could be said to arise "out of and in the course of employment," so as to be compensable under The Workmen's Compensation Act.

Where an employee takes a trip necessitated by both personal and business motives, the courts of the various jurisdictions have consistently applied the "dominant purpose" doctrine as enunciated in *Marks' Dependents v. Gray,* 251 N.Y. 90, 167 N.E. 181 (1929), in determining whether or not the employee is entitled to recover under a workmen's compensation law. In that case, the court, in denying compensation, stated, 167 N.E. at 183:

> If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some

> purpose of his own. . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

Accord, Dauphine v. Indust. Acc. Comm'n, 57 Cal. App.(2d) 949, 135 P.(2d) 644 (1943); *Fleger v. Nicholson Bros.,* 100 Ind. App. 103, 192 N.E. 842 (1934); *Wall v. Aldrich,* 50 S.(2d) 680 (La. 1951); *Butler v. Nolde Bros., Inc.,* 189 Va. 932, 55 S.E.(2d) 36 (1949).

While many of the courts have construed this ruling as requiring that the business aspect be the dominant motive, it is not necessary that it be the sole motive for the trip. *Anderson v. Kroger Grocery & Baking Co.,* 326 Mich. 429, 40 N.W.(2d) 209 (1949); *Cochran v. Maassen Tool & Supply Co.,* 204 Okla. 60, 226 P.(2d) 953 (1951). Where the business motive is the dominant factor, and the trip at the outset is the employer's, detours for personal business of the employee must be separated from the main trip, and injuries incurred during that part of the travel are not compensable. On the other hand, if the dominant purpose is personal, but a detour is made for the benefit of the employer, compensation is allowed for injuries which occurred because of and during the detour. *Kaplan v. Alpha Epsilon Phi Sorority,* 230 Minn. 547, 42 N.W.(2d) 342 (1950); *Barragar v. Indust. Comm'n of Wisconsin,* 205 Wis. 550, 238 N.W. 368 (1931).

All jurisdictions agree in holding that where an employee engages in activity solely for his own private business or pleasure, without reference to the employer's business, injuries resulting from such activity are not compensable. *Harbison-Walker Refractories Co. v. Brown,* 296 Ky. 629, 178 S.W.(2d) 39 (1944); *Shirley v. Nat'l Tank Co.,* 203 Okla. 508, 223 P.(2d) 540 (1950).

In *Liberty Mut. Ins. Co. v. Indust. Acc. Comm'n,* 247 P.(2d) 697 (Cal. 1952), the claimant was a young college student employed by a concessionaire at a summer resort. At the time of day when no duties were required of him, he would, with his employer's knowledge, use the resort swimming pool, which was beyond the property controlled by the concessionaire. The court denied compensation for injuries received from swimming and diving, holding that such activity was not incidental to and did not arise out of the employment.

The same conclusion was reached in a somewhat earlier Georgia case where the employee was injured in an accident while driving to an ocean resort for dinner, after having arrived at the destination to which he had been called by his employer. Although the employee had made previous trips to the resort for his meals at the employer's expense, the court held the injuries not compensable because they arose from a purely personal activity. *United States Fidelity & Guaranty Co. v. Skinner,* 188 Ga. 823, 5 S.E.(2d) 9 (1939).

While the scope of employment of one whose work requires him to travel is broader than that of an ordinary employee, the traveling worker may so conduct or occupy himself as to preclude recovery under the compensation laws. As the court in *Employers' Liability Assur. Corp. v. Warren,* 172 Tenn. 403, 112 S.W.(2d) 837, 841 (1938), stated:

> To illustrate, if he should participate in a prize fight, or provoke and involve himself in a personal difficulty, or take time off for a shooting or fishing excursion, or to attend a ball game or picture show, and suffer injuries . . . he could not recover compensation for such injuries.

The modern trend is toward a more liberal construction of the compensation acts. An injury is held to arise out of the employment if it can be attributed to the nature, conditions, obligations or incidents of the employee's work; in other words, it is compensable if it arises out of any aspect of the employment. *Goodyear Aircraft Corp. v. Indust. Comm'n,* 62 Ariz. 398, 158 P.(2d) 511 (1945) (A warehouse guard working an eight-hour shift without time off to eat, injured while eating lunch); *Smith v. University of Idaho,* 67 Idaho 22, 170 P.(2d) 404 (1946) (Housemother of girls' dormitory injured while shopping for Christmas tree ornaments and refreshments for a party); *Caswell's Case,* 305 Mass. 500, 26 N.E.(2d) 328 (1940) (Employee injured by falling wall during hurricane); *Whitham v. Gellis,* 91 N.H. 226, 16 A.(2d) 703 (1940) (Service station attendant killed while crossing highway on personal errand); *Superior Smokeless Coal & Mining Co. v. Hise,* 89 Okla. 70, 213 Pac. 303 (1923) (Miner fell on frozen ground while walking to work).

If the employee acts for the mutual benefit of himself and his employer at substantially the same time, many jurisdictions hold that "no nice inquiry will be made as to which business he was actually engaged in at the time of injury." *Lockheed Aircraft Corp. v. Indust. Acc. Comm'n,* 28 Cal.(2d) 756, 172 P.(2d) 1, 3 (1946). *Accord, Tallent v. M. C. Lyle & Son,* 187 Tenn. 482, 216 S.W.(2d) 7, 9 (1948).

Although nearly all the states regard incidents of the employment as compensable, there is not always agreement as to what are incidents. New York, foremost of the jurisdictions favoring a broad and liberal construction of workmen's compensation laws, has shown a tendency, in several recent decisions, to regard as an incident of employment whatever the employee may reasonably do for which an express or implied authorization can be found in his contract of employment. In *Gabumas v. Pan American Airways,* 279 App. Div. 697, 108 N.Y.S.(2d) 372 (3d Dep't 1951), the claimant, a flight stewardess, was injured while cycling in a foreign country during a forced lay-over of her plane. The court held that such recreation could be considered as a part of the duties inherent in a stewardess' employment, and therefore injuries incurred therein were compensable. In *Lewis v. Knappen Tippetts Abbett Eng. Co.,* 304 N.Y. 461, 108 N.E.(2d) 609 (1952), the decedent had been a consulting en-